BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: R & L BROSAMER, INC. P.O. Box 238 Alamo, CA 94507-0238 Employer	Docket No. 03-R1D5-4832 **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken this matter under reconsideration, renders the following decision after reconsideration.

JURISDICTION

On December 8, 2003, the Division of Occupational Safety and Health (Division) issued to R & L Brosamer, Inc (Employer) one Citation alleging one violation of section 1592(e) of Title 8, California Code of Regulations. Employer filed a timely appeal contesting the Citation, and asserting numerous affirmative defenses.

This matter came on regularly for a scheduled hearing before an Administrative Law Judge (ALJ) for the Board. On September 6, 2007, the ALJ issued a Decision denying Employer's appeal, and denying all asserted defenses. On October 11, 2007, Employer petitioned for reconsideration. The Division answered the petition for reconsideration on November 20, 2007. The Appeals Board took the matter under submission on November 29, 2007.

The only issue raised in the petition was the existence of the violation. Several arguments regarding the Division's burden of proof form the basis for the petition. We conclude the record provides substantial evidence of the violation, and deny Employer's appeal.

EVIDENCE

Photographs, safety meeting records, the investigation and testimony of Division Safety Engineer Williams, testimony of fellow worksite witness Bea Reynolds (Reynolds), and other documents provide the evidence in this case.[1]

Employer excavated a location in Napa County preparatory to a Cal Trans highway interchange improvement project. The operation consisted of one Komatsu excavator and its operator, and one root picker,[2] Johnny Castro (Castro). Castro was frequently joined by Reynolds, who worked for Shaw Environmental, inspecting the soil on behalf of its recipient, a Napa landfill. Reynolds testified she and Castro worked in the cut area, or "pit" looking for debris in the soil being excavated.

The excavator bucket entered the pit area when Castro and Reynolds were in the pit. The operator could not see them as he moved the bucket in to the pit. The operator's location on the excavator was to the left of the boom, and rotated with the boom as it moved back and forth between the cut area and the soil transport trucks. The operator turned with the boom counter clockwise when the bucket was full so that his field of vision included the destined haul trucks. When the bucket was empty, the boom and operator moved clock wise. In doing so, the operator could not see anything in front of the advancing bucket since his field of vision to the right of the boom was obstructed by the boom. Employer's plan to keep workers from being hit by the excavator consisted of notes in safety meeting records instructing workers generally to stay out of blind spots.[3] The workers understood this to mean that, while in the pit, they were to avoid being struck by the bucket.

If Reynolds and Castro found debris in the pit area, they would climb up out of the pit, walk in to the operator's field of vision on the haul road located next to the pit where the trucks were being loaded, and wave at the operator.

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[1] Petitioner asserts on page 8 of its petition that "[t]he uncontested evidence was that petitioner had many effective controls in place. In fact when Mr. Castro intended to approach within the swing radius of the excavator bucket, he and Mr. Riniker used a system of hand signals and eye contacts to communicate his movements within the swing radius of the excavator." No evidence of hand signaling is contained in the record. Eye contact was used when Mr. Castro was out of the swing radius of the excavator to notify the operator (Riniker) to stop the excavator to allow for debris retrieval. The record shows no communications were made by Castro to the operator while Castro was in the "swing radius" of the excavator.

[2] "Root picker" is the job classification covering any person spotting for debris in the process of excavating soil.

[3] Petitioner asserts on page 7, footnote 5, that the safety meeting records show it trained employees to "stay out of 360 degree turning radius of excavators." The safety meeting note from that day shows such measure was a suggestion offered at the meeting. It does not show Employer instructed workers to do so. The testimony of Reynolds establishes Castro worked within the movement area, or 360 degree radius, of the excavator boom and bucket while inspecting soil in the pit. It appears to be a suggested procedure that was not accepted by Employer. If it was a rule, it was regularly violated by Castro. Asserting Petitioner trained its employees to stay out of the excavator's range of movement misrepresents the record.

He would then cease operations and allow them to retrieve the debris. When they were done, the operator resumed excavation. The record is silent as to how Castro and Reynolds would communicate to the operator that they had removed the unwanted debris. There was also no system in place for Reynolds and Castro to communicate to the operator that they were entering or re-entering the pit.

On July 3, 2003, Reynolds was working with Castro in the pit, inspecting the soil for debris. At one point in the morning the soil looked clean, so she left the pit and went to her truck, which was parked so as to provide her with a partial view of the bottom of the pit, but a full view of the excavator sitting at road elevation above the pit. From her truck she observed Castro carrying a plank of wood along the haul road toward the excavator. She observed Castro place the plank vertical to the road to facilitate the excavator bucket, in a hammering fashion, pound the plank in to the dirt. She concluded this was a marker of some sort, as Castro then spray painted the installed plank orange. Moments thereafter, she saw a full bucket being taken out of the pit by the excavator, moving in a counter clockwise direction to unload in the haul truck. Castro was standing on the haul road out of the pit. She then saw Castro enter the pit, but she did not see where in the pit he stopped as her view to the bottom was obstructed. She then saw the empty excavator bucket swing clockwise and in to the pit. Then, she saw the operator climb out of the excavator and wave his arms and appear to be using his cell phone. She got out of her truck to get a better view and saw Castro lying in the pit. She went to him and observed he had extensive injuries to his lower abdomen, which later that day proved fatal.

ISSUE

Whether the evidence establishes a violation of section 1592(e).[4]

DECISION AFTER RECONSIDERATION

The Division bears the burden of proving each element of a violation by a preponderance of the evidence, including the applicability of the cited safety order. *Cambro Manufacturing Co.*, Cal/OSHA App. 84-923, Decision After Reconsideration (Dec. 31, 1986); *Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (Jun. 16, 1983). The burden of showing something by a "preponderance of the evidence" simply requires the trier of fact to believe that the existence of the fact is more probable than its nonexistence before she may find in favor of the party who has the burden to persuade the judge of the fact's existence. (*Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, (1993) 508 U.S. 602) " 'Preponderance of the evidence' is usually defined in terms of probability

[4] All references are to the California Code of Regulations, Title 8, unless otherwise indicated.

of truth, or of evidence that when weighed with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence. *Leslie G. v. Perry & Associates* (1996) 43 Cal.App. 4th 472, 483, review denied." (*Santa Fe Aggregates, Inc.*, Cal/OSHA App. 00-388 Decision After Reconsideration (Nov. 13, 2001).)

In order to prove a violation of section 1592(e), the Division must show an employer failed to implement control procedures to ensure an excavator operator knew of the location of employees on foot within the vicinity of the equipment. The safety order places the onus on the Employer to establish a method to ensure operators maintain awareness of on-foot employees' location(s). "Hauling or earth moving operations shall be controlled in such a manner as to ensure that equipment or vehicle operators know of the presence of root-pickers, spotters, lab technicians, surveyors, or other workers on foot in the areas of their operations." (§1592(e).)

The meaning of this Safety Order has been considered by the Court of Appeal.

> The safety order is designed to protect workers on foot and imposes an affirmative obligation upon an employer to control such operations. Hauling and earth moving operations inherently involve *movement* of equipment and vehicles in the defined area and the location of such vehicles changes within the area of operation. Only where control measures are used by the employer to ensure that operators know of workers on foot in their immediate vicinity will the safety order have the intended effect of protecting workers on foot from the hazards of hauling and earth moving equipment.

(*Teichert Const. v. California Occupational Safety and Health Appeals Bd.* (2006) 140 Cal.App.4th 883, 891-892). The lack of adequate control measures implemented by an employer establishes the violation.

The record shows that Employer implemented a procedure whereby the workers on foot were responsible for avoiding the movement of the boom. The workers fulfilled this instruction by timing the excavator bucket's movements from the cut area to the dump area and back again. This procedure omitted any method of informing the operator as to when the employees would enter the pit. The only communication to the operator took place when the root pickers had left the pit and needed the operator to cease operations to allow them to retrieve debris they had spotted while in the pit. Such a procedure in no way "ensures" the operator "knows" of the location of the employees in the pit near the excavator bucket. (Section 1592(e).) Thus it cannot satisfy the requirement to implement procedures which keep the operator informed of the

locations of others. (*Teichert*, *supra*.) It has been determined to be a violation of section 1592(e) to generally inform operators that people could be on foot in the vicinity of the equipment. (*Teichert*, *supra*, 140 Cal App. 4th at 889.)

The safety meeting records show a plan whereby the operator was aware that at any point a worker could be in the pit, and that those workers would attempt to stay out of the way of the loads. Such a plan tells the operator he need not watch for ground personnel, and that, even though he moved the bucket in to an area beyond his field of vision, any employees in the way would move out of the way. Even less effective than the general warning of people possibly on foot near the equipment that the *Teichert* court found inadequate, this Employer's plan absolved the operator of any obligation to be aware of the root pickers' location by requiring the root pickers to stay out of the way of the load and equipment. (*Teichert*, *supra*.) Such a plan does not control earthmoving operations to ensure operators know of the presence of workers on foot in the immediate vicinity of the equipment.

When the Division presents sufficient evidence of a violation and the Employer produces no contrary evidence, the violation is rightly upheld. "In *Lone Pine Nurseries*, Cal/OSHA App. 00-2817, Decision After Reconsideration (Oct. 30, 2001) the Board said: "*preponderance of the evidence* is usually defined in terms of probability of truth, or of evidence that when weighed with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence." (*Hensel Phelps Construction Co.*, Ca/OSHA App. 01-1618 Decision After Reconsideration (Jul. 6, 2007) citing *Leslie G v. Perry & Associates* (1996) 43 Cal.App.4th 472.)

While the specific requirements of ensuring the operator is aware of the exact location of on-foot workers will vary from one setting to another, here Employer offered no evidence to contradict Reynolds's statement that there were no measures used to inform the operator of where she and Castro were located when they were in the pit, entering the pit, or re-entering the pit. For example, a spotter using hand signals, a short range walkie-talkie–type radio communicator used by the on foot workers to signal they were clear of the bucket's path, or a system to inform the operator when the root pickers were entering the excavation, would likely have avoided the fatal accident in this case. Without any evidence to rebut the Division's evidence that the only method used to avoid the hazard addressed by section 1592(e) was instruction to the on-foot workers to avoid being hit by the bucket, it is proper to uphold the citation. (See *Mascon Inc.*, Cal/OSHA App. 08-4279 Denial of Petition for Reconsideration (Mar. 4, 2011).)

Even though the operator's mental state is not an element of section 1592(e), the ALJ made a finding that the operator did not in fact know of Castro's location when he struck Castro with the excavator bucket. Employer asserts this factual finding is error requiring reversal of the denial of its appeal. The Board disagrees.

First, the inference was a reasonable one to draw from the facts of the operator striking Castro with the bucket, and ALJs may draw reasonable inferences from the evidence. (*Mechanical Asbestos Removal, Inc.*, Cal/OSHA App. 86-362, Decision After Reconsideration (Oct.13, 1987).) The evidence of the operator striking Castro is circumstantial evidence of the operator's state of mind.

> Circumstantial evidence is that which is applied to the principal fact, indirectly, or through the medium of other facts, from which the principal fact is inferred. The characteristics of circumstantial evidence, as distinguished from that which is direct, are, first, the existence and presentation of one or more evidentiary facts; and, second, a process of inference, by which these facts are so connected with the fact sought, as to tend to produce a persuasion of its truth.

(Witkin, 1 *California Evidence*, Circumstantial Evidence §1 (2008) quoting *People v. Goldstein* (1956) 139 Cal.App. 2d 146, 152.) Circumstantial evidence may be as persuasive and convincing as direct evidence and may properly be found to outweigh conflicting direct evidence. (*ARB, Inc.*, Cal/OSHA App. 93-2084, Decision After Reconsideration (Dec.22, 1997). It seems entirely reasonable to infer from the fact that the operator struck Castro that he was unaware of Castro's location in the pit.

Employer argues the inference of the operator's ignorance regarding the exact location of Castro must be rejected because the Division had more reliable evidence of the fact of the operator's ignorance or knowledge, relying on Evidence Code section 412.[5] Although Evidence Code section 412 allows a trier of fact to view weak evidence of a fact with distrust if stronger evidence is available and not relied on by the party bearing the burden of proof of such fact, the inference does not arise here.[6] In addition, Employer's argument that

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[5] While the Board generally applies the principles of law contained in the California Evidence Code, the code itself is not controlling in Appeals Board proceedings. (*International Transportation Services Inc.*, Cal/OSHA App. 93-2001, Decision After Reconsideration (Jun. 26, 1997).) (*Tutor-Saliba-Perini*, Cal/OSHA App. No. 95-1494 Decision After Reconsideration (Jun. 30, 2000).)

[6] When the evidence is in conflict regarding a material fact, an ALJ may resolve the conflict by rejecting evidence proffered by one party when stronger evidence is available to that party, but the party chose to offer the weaker evidence instead. (*C.C. Meyers,* Cal/OSHA App. 94-1862, Decision After Reconsideration (Nov. 25, 1998); *Tomlinson Construction,* Cal/OSHA App. 95-2269, Decision After Reconsideration (Feb. 18, 1998).) It is inappropriate to apply the Evidence Code section 412 inference of unreliability of proffered evidence when the purportedly stronger evidence is equally available to both parties, as was the

error occurred as a result of the ALJs inference misapprehends the elements of the safety order. Whether the operator actually knew Castro's specific location immediately prior to the accident is not a material fact under the specific terms of the safety order. Whether the operator was actually aware of the presence of Castro in the pit does not resolve the question of whether Employer controlled earthmoving procedures in such a manner as to ensure equipment operators know of the presence of root pickers in the area. A fact, though collateral to the main issue, is relevant if it tends to make the facts in issue more certain. (*People v. Torres* (1964) 61 Cal 2d 264, 266.) The circumstantial evidence of the operator's lack of knowledge is just such a collateral fact. That is, although the operator's ignorance of the on-foot worker's location need not be proven to establish a violation of section 1592(e), such evidence tends to affirm that Employer's procedure of asking root pickers to watch out for the equipment actually failed to inform this operator on this day of the location of a specific on foot employee.

The Division inspector undertook an investigation, as did the California Highway Patrol, and the Napa Police Department. The Employer undertook its own investigation of the incident, but did not rely on its findings in its defense. Had any of these investigations revealed that operator error caused the accident, and that the operator actually knew of Castro's location, Employer could have presented that evidence to rebut the other evidence and inferences drawn from it. But, Employer did not do so.

Decision After Reconsideration

The evidence showed Employer had no method of informing the operator of the root pickers' location in the cut area,[7] but rather attempted to avoid injuries by requiring the root pickers to avoid being hit by the equipment. This evidence establishes the violation. In addition, there was sufficient reliable direct evidence that Castro was crushed by the Komatsu excavator bucket. Such evidence also provides circumstantial evidence that the operator was

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case here. Since the evidence regarding the operator's mental state was not in conflict, and both parties had equal ability to call the operator to elicit direct testimony regarding whether he knew of Castro's location prior to striking him with the equipment, Evidence Code section 412 is inapplicable here. *Patton v. Royal Industries, Inc.* (1986) 263 Cal.App.2d 760, 769 citing *Davis v. Franson*, 141 Cal.App.2d 263, 296 P.2d 600; *Gillett v. Gillett*, 168 Cal.App.2d 102, 335 P.2d 736; see *Tutor-Saliba-Perini,* Cal/OSHA App. 97-3210, Decision After Reconsideration (Apr. 24, 2003).)

[7] Employer argues the hand waving done by the pickers to get the attention of the operator was a method of informing operators of the location of the pickers in the cut area. This misstates the evidence. The only witness to the root picking operations testified that if they located debris, the root pickers would walk up out of the cut area, stand on the road in the operator's field of vision, and wave to get the operator's attention. Once obtained, the operator would cease operations while the specific debris was pulled from the cut area. There was no evidence as to what signaling was used to resume excavating. The root pickers had to be in the pit near the excavator bucket observing the soil, at which time the operator could not see them as he swung the boom clockwise beyond his field of vision. And, there was no established method for the root pickers to even tell the operator when they were entering the pit area.

unaware of Castro's location in the cut area. This evidence tends to confirm that Employer had no method of ensuring the operator knew of the location of root pickers. But, the operator's actual knowledge, or lack thereof, does not satisfy the requirement that Employer devise a reliable method of informing the operator of the root picker's exact location.

We hereby affirm the denial of Employer's appeal of Citation one, Item one, and uphold the $450.00 penalty.

ART R. CARTER, Chairman
CANDICE A. TRAEGER, Board Member
ED LOWRY, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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